STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 29, 2009
v	No. 290274 St Clair Circuit Court
PAUL TASAIN THOMAS, Defendant-Appellant.	LC No. 08-000098-FH

Before: Saad, C.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Defendant Paul Thomas appeals by delayed leave granted the sentence imposed on his plea-based conviction of domestic violence, third offense.[1] We vacate Thomas's sentence and remand for resentencing. We decide this appeal without oral argument.[2]

I. Offense Variable 13

A. Standard Of Review

Thomas argues that the trial court erred when it scored offense variable (OV) 13[3] at 25 points. In general,

> [t]his Court reviews a trial court's scoring decision under the sentencing guidelines "to determine whether the trial court properly exercised its discretion and whether the evidence of record adequately supported a particular score." A trial court's scoring decision "for which there is any evidence in support will be

[1] MCL 750.81(4).

[2] MCR 7.214(E).

[3] MCL 777.43 (continuing pattern of criminal behavior).

upheld." This Court reviews "de novo as a question of law the interpretation of the statutory sentencing guidelines." *Id.*[4]

B. Crimes Against A Person

Twenty-five points are to be scored for OV 13 if the offense "was part of a pattern of felonious criminal activity involving 3 or more crimes against a person."[5] All crimes within a five-year period, including the sentencing offense, are to be counted "regardless of whether the offense resulted in a conviction."[6] Here, Thomas maintains that the trial court erred when it counted Thomas's 2004 charged offense of resisting and obstructing a police officer, because Thomas later pleaded to a misdemeanor offense of disorderly person[7] in that case. Thomas maintains that the crime of which he was convicted is not a crime against a person. He acknowledges that MCL 777.43 provides for a finding that a defendant committed a crime for which he was not convicted, when proof of the offense is shown by a preponderance of the evidence.[8] However, he contends that the trial court failed to address this standard and "failed to even indicate that he had any such evidence."

C. Evidentiary Standards

The rules of evidence do not apply to a sentencing proceeding and are not required by due process.[9] "Thus, when considering a defendant's sentence, a trial court may properly rely on information that would otherwise not be admissible under the rules of evidence."[10] However, a defendant must be afforded an adequate opportunity to rebut any matter he believes to be inaccurate.[11] In reviewing the presentence investigation report (PSIR), the information contained therein is presumed to be accurate, but upon assertion of a challenge to the factual accuracy of information, a court has a duty to resolve the challenge.[12] Once a defendant effectively challenges a factual assertion, the prosecutor has the burden to prove the fact by a preponderance of the evidence.[13] When the accuracy of the PSIR is challenged, the trial court must allow the

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[4] *People v Steele*, 283 Mich App 472; 769 NW2d 256 (2009) (internal quotations and citations omitted).

[5] MCL 777.43(1)(c). At the time of the offense, this language was found in MCL 777.43(1)(b).

[6] MCL 777.43(2)(a).

[7] MCL 750.167(1)(e).

[8] See *People v Ratkov* (*After Remand*), 201 Mich App 123, 125; 505 NW2d 886 (1993).

[9] *People v Uphaus* (*On Remand*), 278 Mich App 174, 183-184; 748 NW2d 899 (2008), citing *United States v Hamad*, 495 F3d 241, 246 (CA 6, 2007) and MRE 1101(b)(3).

[10] *Uphaus*, *supra* at 184.

[11] *Id.*

[12] *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997); *Uphaus*, *supra* at 182; *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003).

[13] *Ratkov*, *supra* at 125.

parties to be heard and must make a finding as to the challenge or determine that the finding is unnecessary because the court will not consider it during sentencing.[14]

D. Applying The Standards

When Thomas raised this issue during sentencing, the prosecutor noted that the initial police report for the 2004 offenses was among the materials provided to the probation department when it prepared the PSIR for the instant case, intimating that the person who prepared the report must have read it to arrive at the OV 13 scoring. The trial court found that "the offense was part of a pattern of felonious activity involving criminal activity involving three or more crimes against a person." However, the trial court did not make specific findings concerning the 2004 incident. Nor did the trial court appear even to have reviewed the police report, if it was in fact provided to the court. Thus, while some evidence exists that Thomas may have committed this crime in 2004, the trial court's failure to review this evidence and to make a specific finding requires a remand for resentencing.

II. *Blakely*

Thomas argues that the trial court erred when it scored the offense variables in the instant case on the basis of facts not found by a jury, citing *Blakely v Washington*.[15] This issue is without merit. The Michigan Supreme Court has held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme.[16]

Thomas also argues that his sentence is disproportionate. This issue is moot, given the need for a remand.

We vacate Thomas's sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra

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[14] MCR 6.425(E)(2).

[15] *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

[16] *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007); *People v Harper*, 479 Mich 599, 615; 739 NW2d 523 (2007); *People v Drohan*, 475 Mich 140, 163-164; 715 NW2d 778 (2006).